Supreme Court, U.S.
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No. 00-1615

In The

Supreme Court of the United States

DIXIE DISTRIBUTING COMPANY and
HARRY C. DENUNE,

Petitioners,

v.

CARTER-JONES LUMBER COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied Ohio's common law in deciding whether to pierce the corporate veil to hold a shareholder derivatively liable for a corporation's violations of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

2. Whether the court of appeals properly exercised its discretion in declining to certify a question to the Ohio Supreme Court concerning the proper application of Ohio's common law of corporate veil-piercing.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Sup. Ct. R. 29.6, Carter-Jones Lumber Company declares that it is a wholly owned subsidiary of Carter-Jones Companies, Inc. No publicly held company owns more than 10 percent of Carter-Jones Companies, Inc.'s stock.

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RULE

Sup. Ct. R. 10 6

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Carter-Jones Lumber Company hereby opposes the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT

The only question actually posed in this case is whether the Sixth Circuit properly applied Ohio's common law standards governing piercing the corporate veil in holding a shareholder liable derivatively for violations of CERCLA committed by a corporation. It is difficult to imagine a question more unworthy of certiorari by this Court. The questions petitioners purport to present in order to avoid the fatal weakness in seeking review of the actual holding below simply are not posed. The court of appeals did not decide any question under CERCLA; instead, the parties **agreed** to treat veil piercing as solely a question of Ohio law, and thus, all that the court of appeals decided was the proper state-law standard to use. In so doing the court below applied the most directly relevant Ohio Supreme Court precedent in a manner fully consistent with the way that opinion had been applied by three intermediate state courts of appeals. Petitioners conceded below in their certification motion that the question whether to certify was committed to the sound discretion of the court of appeals. App., *infra*, 3a. Nothing in its unwritten decision not to certify poses any question suitable for review by this Court. In sum, the petition should be denied.

1. Respondent was the owner of property in Groveport, Ohio, on which polychlorinated biphenyls ("PCBs"), a hazardous substance under CERCLA, were disposed. Respondent cleaned up the PCBs at a cost of $3,880,000, and then brought suit against petitioners in the United States District Court for the Southern District of Ohio for contribution. Petitioners are Dixie Distributing Company and its sole shareholder, Harry C. Denune.

In 1985, Denune purchased ten transformers that contained PCBs and arranged to dispose of them. Ultimately, four of those transformers were stored at the property owned by respondent, but leased to a third party. This disposal was unquestionably in violation of CERCLA. The litigated issue thus became the extent to which Denune should be held personally responsible for his blatantly illegal conduct. "While Denune did not control every aspect of Dixie's affairs or every transaction, he clearly controlled the particular transactions that constituted the CERCLA violations for which Dixie was found liable." Pet. App. 4a.

2. The district court after a bench trial held in its initial decision that Denune was directly responsible for 30 percent of the response costs and that Dixie Distributing was 50 percent responsible. Pet. App. 69a. Denune and Dixie, however, were jointly and severally liable for Dixie's share (*id.* at 70a), which was significant because Dixie had become insolvent by the time of the district court's decision (*id.* at 20a). The court of appeals affirmed Denune's direct liability, but remanded the issue of Denune's joint liability for Dixie's share of the recovery costs to the district court for a determination under Ohio's veil-piercing standards, which the court of appeals

held was necessary in light of this Court's decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998). Pet. App. 34a.

On remand, the district court applied Ohio law to decide whether to pierce Dixie's corporate veil in order to hold Denune jointly liable for the damages award imposed on the corporation. Applying the Ohio Supreme Court's leading opinion on the issue, *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993), the district court found that "the conduct attributable to [Dixie] was, to a great extent, the conduct of [Denune]." Pet. App. 21a. Accordingly, the district court concluded that "Denune had the requisite control to pass the first prong of the *Belvedere* test." *Id.*

3. The Sixth Circuit affirmed. On the preliminary question of whether state or federal law applied, the court noted that petitioners had not argued for a federal rule of decision and thus the sole question was the proper application of Ohio law. Pet. App. 2a n.1. Relying upon the Ohio Supreme Court's decision in *Belvedere*, the court of appeals concluded that Dixie " 'had no separate mind, will, or existence of its own' " as applied to the disposal of the transformers. *Id.* at 6a. In holding that a transaction-specific analysis was warranted under Ohio law in piercing the corporate veil, the court of appeals relied upon intermediate appellate court decisions in Ohio that had applied the *Belvedere* "control" test to isolated transactions. *Id.* at 9a-10a (citing *Janos* v. *Murduck*, 109 Ohio App. 3d 583, 672 N.E.2d 1021 (1966); *Wiencek* v. *Atcole Co.*, 109 Ohio App. 3d 240, 671 N.E.2d 1339 (1996); *Sintel, Inc.* v. *Budget Sys.*, No. 74249, 1999 Ohio App. LEXIS 2774 (Ohio Ct. App. June 17, 1999)).

In response to petitioners' argument that *Bestfoods* did not permit Denune to be held liable derivatively, the court's answer was that *Bestfoods* commanded the courts to look to the common law on veil piercing to determine when to hold a corporate shareholder liable for actions taken by the corporation. Pet. App. 11a. The court recognized that it was "a coincidental fact" that Ohio law imposed derivative liability in circumstances where CERCLA imposes direct liability. *Id.* Nonetheless, petitioners had not argued for a rule other than Ohio's to be applied and thus there was no need to "harmonize" common law rules and the statutory scheme. *Id.*

ARGUMENT

Petitioners' primary claim is that the decision below conflicts with this Court's decision in *Bestfoods*. Alternatively, petitioners begrudgingly and implicitly acknowledge that the only real issue in this case arises under Ohio law and thus they argue that the Sixth Circuit erred in not certifying that question to the Ohio Supreme Court.

There is no conflict between the holding here and *Bestfoods*. The court of appeals understood clearly the difference between direct and derivative liability and followed precisely the course set down by this Court in *Bestfoods* by deciding that the State's common law rules required piercing the corporate veil to hold Denune liable in this case. As for the second issue, petitioners made none of the arguments below that they trumpet in this Court. Instead, they blandly invited the Sixth Circuit in

the exercise of its discretion to certify the issue to the Ohio Supreme Court. Because the State's highest court already had established the fundamental standard of law and the State's intermediate appellate courts had consistently applied that test to isolated transactions, the court of appeals rightly declined, without opinion, to certify any questions. That action was no abuse of discretion, and thus the petition should be denied.

1. Contrary to petitioners' assertion (Pet. 9-12), there is nothing inconsistent between the holding below and this Court's decision in *Bestfoods*. To be sure, this Court adopted a distinction between direct and derivative liability, but the Court recognized that a shareholder could be "charged with derivative CERCLA liability" whenever "the corporate veil may be pierced." 524 U.S. at 62-64. The court of appeals here properly applied that rule and concluded that Ohio would pierce the corporate veil in the circumstances posed in this case. Accordingly, this is a garden variety application of *Bestfoods* and in no event conflicts with that decision.

As the court of appeals recognized, petitioners' argument "would have more force" if they had pressed for a federal common law rule to be applied. Pet. App. 11a. But they did not do that. See page 3, *supra*. Therefore, the "coincidental fact" that Ohio's particular rule overlaps with CERCLA's standard for applying "direct" liability presents no question under *Bestfoods* warranting review by this Court.

Nor is there any risk that "the central holding of *Bestfoods* will be gutted." Pet. 12. Ohio's rule only applies

here because petitioners did not press the more interesting issue of whether a federal common law rule should be adopted. Having failed to raise that issue, their complaint reduces to carping over the proper application of Ohio law, which is inherently unworthy of review by this Court. Sup. Ct. R. 10.

2. Petitioners attempt to make a mountain out of the molehill of the court of appeals' refusal without opinion to certify the question of whether a transaction-specific theory of liability is available under Ohio law governing piercing the corporate veil. In contrast to the extended discussion of the issue presented here, petitioners devoted scant attention to this issue below. The motion, which is reproduced in full in the appendix, clearly indicates that the certification issue is a matter firmly committed to the court of appeals' discretion. App. 3a. Thus, petitioners should not be heard to complain that the court below ignored the various precedents cited here, which petitioners never bothered to cite in their papers below.

Moreover, it is clear that the court of appeals did not abuse its discretion in declining to seek guidance from the Ohio Supreme Court and that its decision in the unique circumstances posed here does not remotely conflict with the holdings of this Court or any other court of appeals.

Petitioners assert (Pet. 12-20) that other courts of appeals would have certified the state-law question of whether there is a transaction-specific use of the veil-

piercing doctrine in Ohio. But the cases cited by petitioners arise in vastly different circumstances. The situation here – where the state supreme court has announced the proper general standard and the only intermediate appellate courts that have addressed the specific problem have reached the same result – is not presented by any of the cases relied upon by petitioners. In *Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998), the court held that certification was appropriate because there were "at least two divergent views of the law to be found in the intermediate New York courts." There are no divergent holdings in the Ohio courts and petitioners do not claim that there are. Instead, they divine differing views based solely on broad recitations of legal standards in cases that did not pose the transaction-specific issue. Those appellate courts that actually have addressed that issue consistently have reasoned that the corporate veil can be pierced.

In *Grubbs* v. *Gulf International Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993) (per curiam), the Fifth Circuit interpreted a Louisiana Supreme Court opinion in a particular way, but then two intermediate appellate courts handed down decisions casting doubt on that interpretation. Here, the Sixth Circuit's ruling is completely in accord with the holdings of the Ohio courts of appeals. Similarly, in *Blanchard* v. *State Farm Mutual Automobile Insurance Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990), the court certified because there was "a division in the reasoning among the Florida district courts of appeal" and both parties had urged the court to certify the question. That situation bears no resemblance to this case. Finally, in *Colonial Properties, Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d

384, 386-87 (11th Cir. 1996), the question involved a matter "of first impression under Alabama law," which is the basis for that court's observation about having to " 'guess[ ]' " as to what the state's law is. Here, the Ohio courts have eliminated the guesswork by uniformly applying the State supreme court's general rule to the specific situation posed. Thus, *Colonial Properties* is plainly distinguishable. In sum, there is no conflict among the circuits that might otherwise warrant this Court's attention.

Moreover, every case cited by petitioners arose under the federal courts' diversity jurisdiction, which is when forum shopping is likely to be a serious concern. See *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). Here, the issue arises in connection with a claim arising under CERCLA, which typically would be presented in federal court in any event. Thus, even the policy concerns underlying certification generally that are cited by petitioners (Pet. 16-17) are not implicated here at all. Accordingly, the mundane exercise of discretion not to certify a question to the Ohio Supreme Court in the context of a CERCLA contribution action does not remotely warrant certiorari.

* * *

Ultimately, the court of appeals recognized that the doctrine of piercing the corporate veil in Ohio, as elsewhere, is designed to protect against " 'harm, injustice, or fundamental unfairness' " when it arises in connection with abuse of the corporate form. Pet. App. 8a (quoting *AT&T Global Info. Solutions Co.* v. *Union Tank Car Co.*, 29 F. Supp. 2d 857, 868 (S.D. Ohio 1998)). Denune's illegal activities, which required extraordinary control of the

corporation during a period of almost four years, directly implicate those concerns. As the Sixth Circuit said:

> Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities? Neither we nor the Ohio courts hold that such immunity exists.

Id. In sum, holding Denune liable was both imminently fair and based on both legal standards and principles of justice embodied in Ohio law. In that situation, further review by this Court is manifestly not appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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